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Jan Witold Baran

November 13, 2008

BY HAND

Ms. Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6075 (Congresswoman Kay Granger and Congressman Joe Barton)

Dear Ms. Duncan:

This office represents Congresswoman Kay Granger and Congressman Joe Barton in the above-captioned MUR. We are responding to the Complaint filed on September 24, 2008, by Betty Tumlinson Fischer. As detailed below, the Complaint fails to allege facts that constitute a violation and this response – along with the enclosed affidavit – demonstrate that no violation occurred. Therefore, the Commission should find no reason to believe that either Congresswoman Granger or Congressman Barton violated the Federal Election Campaign Act of 1971, as amended ("Act"), and this matter should be dismissed.

FACTS

On August 19, 2008, the campaign of Texas State Representative Bill Zedler issued a fundraising event invitation with a request that attendees donate $5,000, $2,500, or $1,000. The invitation included "The Honorable Kay Granger" and "The Honorable Joe Barton" among the five "Honorary Hosts" of the event. The other "Honorary Hosts" were elected officials of the Texas state government. The invitation also included "The Honorable Tom Craddick," Speaker of the Texas House, as a "Special Guest."

Representative Zedler had previously approached Congresswoman Granger's and Congressman Barton's respective staffs to determine whether Congresswoman Granger and Congressman Barton would be willing to serve as "Honorary Hosts" in connection with the event. They both preliminarily agreed to do so. However, neither Congresswoman Granger nor Congressman Barton, nor their respective staffs, reviewed or were otherwise aware of the August 19 invitation before it was issued by the Zedler campaign.

Upon learning about the invitation from Representative Zedler after a press account regarding it appeared in the *Texas Weekly*, staff for Congresswoman Granger and Congressman Barton conferred with Representative Zedler and agreed with his decision to reissue the invitation without the Members of Congress' names, explain that the reissued invitation supersedes the August 19 invitation, and include additional clarifying information.

On August 28, the Zedler campaign reissued the invitation without the names of Congresswoman Granger and Congressman Barton and included the following additional language:

> This corrected invitation supersedes all other invitations in order to ensure complete compliance with state and federal law.... Personal and PAC checks are welcome. Corporate donations are prohibited by state law.

The fundraising event was held on September 9, but neither Congresswoman Granger nor Congressman Barton attended. In addition, no individual contributed more than $1,250 in connection with the event.

On September 29, Congresswoman Granger and Congressman Barton received a copy of the Complaint from the Commission. The Complaint alleged that the August 19 fundraising invitation must be deemed a solicitation by Congresswoman Granger and Congressman Barton because the invitation included their names on it. The Complaint suggested that any mention of another person in a fundraising solicitation is presumptively authorized by – and is therefore a solicitation by – that other person.

The Complaint also speculated that Congresswoman Granger and Congressman Barton directly authorized Representative Zedler to use their names to solicit the funds requested in the invitation. The Complaint stated that "it is inconceivable that [Representative Zedler] would have distributed an invitation featuring two Members of Congress without having secured their consent beforehand."

The Complaint concluded that, notwithstanding the August 28 reissued and superseding invitation, the solicitation of funds contained in the August 19 invitation must be attributed to Congresswoman Granger and Congressman Barton

and the invitation's request for contributions of $5,000 and $2,500 exceeded the $2,300 limit on personal contributions they may solicit under the Act.

THE ACT & IMPLEMENTING REGULATIONS

Congresswoman Granger and Congressman Barton were incumbent Members of Congress and candidates for reelection at the time of the activity described in the Complaint. Accordingly, they were both subject to 2 U.S.C. § 441i(e)(1)(B) as implemented by 11 C.F.R. § 300.62 which states:

> A person described in 11 CFR 300.60 may solicit, receive, direct, transfer, spend, or disburse funds in connection with any non-Federal election, only in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits or come from prohibited sources under the Act.

11 C.F.R. § 300.60 describes the following persons:

> (a) Federal candidates;
>
> (b) Individuals holding Federal office ...; and
>
> (c) Agents acting on behalf of a Federal candidate or individual holding Federal office.[1]

DISCUSSION

1. A Federal Candidate or Officeholder Does Not Solicit Contributions If His or Her Name Merely Appears On a Fundraising Invitation Prepared and Sent by Someone Else.

Commission authority is clear that a non-federal solicitation by someone else is not automatically imputed to a federal candidate or officeholder when his or her name is used in connection with the solicitation. Accordingly, a complaint that alleges nothing more than the fact that a federal candidate's or officeholder's name appears

[1] 11 C.F.R. § 300.60 also refers to: "(d) Entities that are directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more Federal candidates or individuals holding Federal office." This provision is not implicated by the Complaint and is not otherwise relevant to this matter.

in a solicitation for non-federal funds fails to allege facts that the federal candidate or officeholder solicited non-federal funds.

The regulatory definition of the phrase "to solicit" turns on an assessment of "the conduct of persons involved in the communication." 11 C.F.R. § 300.2(m). The accompanying Explanation & Justification ("E&J") to the regulation emphasizes that the analysis turns on "the speaker or other persons involved" and provides the following example of involvement that is also codified in the regulations:

> The head of Group X solicits a contribution from a potential donor in the presence of a candidate. The donor asks the candidate if the contribution to Group X would be a good idea and would help the candidate's campaign. The candidate nods affirmatively.

71 Fed. Reg. 13926, 13929 (Mar. 20, 2006) (citing 11 C.F.R. § 300.2(m)(2)(xvi)). Accordingly, the federal candidate or officeholder must be actively involved in order for a solicitation to be considered his or her own. If not, then the example quoted above would end at the first sentence. Accordingly, a third party's use of a federal candidate's or officeholder's name, without more, is not *ipso facto* a solicitation by the federal candidate or officeholder.

The Complaint cites FEC Advisory Opinion 2003-3 as authority to the contrary. However, this Advisory Opinion is consistent with the above-discussed – and subsequently imposed – regulatory hurdle that there be involvement by a federal candidate or officeholder. The Commission explained (at 7) that publicity for a fundraising event is only considered a solicitation by a covered federal candidate or officeholder if "the covered person approved, authorized, or agreed or consented to be featured or named in, the publicity." Without such involvement, a solicitation contained in fundraising event publicity cannot be attributed to the federal candidate or officeholder referred to in the publicity.

Commission regulations instruct that a complaint "should contain a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(d)(3). The only fact alleged in the Complaint linking Congresswoman Granger and Congressman Barton to a non-federal fundraising invitation is that their names appeared on the invitation. As just explained, this does not describe a violation.

Accordingly, the Commission should find no reason to believe that Respondents have violated the Act based on the allegations in the Complaint.

2. Congresswoman Granger and Congressman Barton Were Not Involved In Preparing Representative Zedler's Fundraising Invitation And Did Not Authorize The Use Of Their Names To Solicit The Contributions Requested In The Invitation.

Notwithstanding the failure of the Complaint to allege any involvement by Congresswoman Granger and Congressman Barton in connection with the fundraising invitation issued by Representative Zedler's campaign, the enclosed affidavit executed by Representative Zedler demonstrates that Congresswoman Granger and Congressman Barton were not aware of the fundraising invitation, did not review it, and did not authorize that their names be used to solicit the contributions requested in the invitation.

The Complaint concludes that "it is inconceivable that [Representative Zedler] would have distributed the invitation featuring two Members of Congress without having secured their consent beforehand." The enclosed affidavit confirms that the Complaint's speculation is wrong. Neither Congresswoman Granger nor Congressman Barton reviewed the fundraising invitation, much less, provided their consent to solicit the funds requested by it.

The above-described regulatory definition of the phrase "to solicit" requires involvement by another person in order for a solicitation to be considered that person's. Congresswoman Granger and Congressman Barton were not involved in making the solicitation at issue here. Accordingly, Congresswoman Granger and Congressman Barton did not violate the prohibition on soliciting non-federal funds.[2]

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[2] Among the Complaint's other unsupported conclusions is the statement that "Bill Zedler was an agent of Barton and Granger, at least for purposes of the September 9 event." The regulatory definition of "agent" turns on whether a person has "actual authority, either express or implied." 11 C.F.R. § 300.2(b). As demonstrated in the attached affidavit Congresswoman Granger and Congressman Barton did not either expressly or impliedly grant actual authority to Representative Zedler or his campaign to raise non-federal funds on their behalf.

The Complaint later suggests that perhaps an apparent authority standard should be used to evaluate Congresswoman Granger's and Congressman Barton's relationship with Representative Zedler and his campaign: "The attached invitation from the Bill Zedler Campaign uses Barton and

3. The Fundraising Invitations Solicited Funds Within – and the Contributions Received in Response Complied With – the Federal Amount and Source Restrictions.

The Zedler campaign's August 19 fundraising event invitation solicited personal and PAC funds – corporate and union funds are prohibited in Texas[3] – of $5,000, $2,500, and $1,000 which is consistent with the federal amount and source restrictions that permit individual contributions up to $2,300 and PAC contributions up to $5,000. The invitation did not solicit non-federal funds in excess of the Act's contribution limits or from prohibited sources. Accordingly, even if the Zedler campaign's August 19 solicitation could be attributed to Congresswoman Granger and Congressman Barton, it would not have been an impermissible solicitation of non-federal funds pursuant to 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62.

Nonetheless, the Complaint alleges that the solicitation of $5,000 and $2,500 *could* be misinterpreted as a solicitation for individual contributions that are subject to the $2,300 limit, not permissible PAC contributions. Of course, the solicitation does not have to be understood in these terms. In fact, the Zedler campaign issued its superseding invitation to prevent any such misunderstanding. By removing Congresswoman Granger's and Congressman Barton's names, the Zedler campaign ensured that however the invitation was understood, the solicitation was not one by a federal candidate or officeholder. The fact that neither Congresswoman Granger nor Congressman Barton attended the event reinforced this point.[4]

Lastly, the solicitation did not result in personal contributions to the Zedler campaign in excess of the $2,300 limit. Accordingly, the substantive harm that motivates the prohibition against federal candidates and officeholders soliciting non-federal funds never occurred.

(Continued . . .)
Granger's names – with their apparent authorization – to ask for contributions...." Of course, the Commission has foreclosed use of an apparent authority standard when analyzing agency. *See* 71 Fed. Reg. 4975, 4976-77 (Jan. 31, 2006).

[3] *See* Tex. Elec. Code Ann. § 253.094.

[4] The above-described actions belie the Complaint's clearly unsupported statement that "Respondent's failure to adequately inform donors of the violation, reduce the level of donation requested or ask that Barton and Granger withdraw as event sponsors appears to be deliberate."

CONCLUSION

The invitation that formed the basis of the Complaint – and the circumstances surrounding it – did not amount to a violation of the federal candidate and officeholder prohibition against soliciting non-federal funds. Accordingly, the Commission should find there is no reason to believe that Congresswoman Granger and Congressman Barton violated the Act and this matter should be dismissed.

Sincerely,

Jan Witold Baran
Caleb P. Burns

Enclosure

Given the Commission's stated position regarding this issue, it would be hard for the Audit Division to justify imposing a different winding down period estimate than the Edwards Committee. Both the Committee and the Audit Division agree that the Committee's winding down estimates are within the regulatory limitation. While the Audit Division is correct that the limitation is a cap rather than an entitlement, there does not appear to be any evidence to suggest that the Committee's estimates are patently unreasonable.[10] Hence, there does not appear to be a compelling reason to question whether the regulatory monetary limitation must be supplemented by a time limitation in this case, especially in light of the fact that the Commission implemented its rule specifically to avoid disputes of this nature in the future. *Explanation & Justification for 11 C.F.R. § 9004.11*, 68 Fed. Reg. 47,390-91 (Aug. 8, 2003).

Given the reasons outlined above, this Office recommends that Audit revise the Proposed Report and NOCO Statement to allow the Committee to wind down through 2011.

D. OBJECTION TO REPAYMENT OF MATCHING FUNDS

The Committee argues that the Candidate was entitled to more public funds than he received. The Candidate requested a total of $12,882,877.42 in matching funds in four separate submissions dated November, 1, 2007, December 3, 2007, January 2, 2008, and February 1, 2008. Given that the Candidate's DOI was January 30, 2008, three of these submissions, totaling $9,972,364.34, were requested during the Candidate's period of eligibility. However, the January 2, 2008 submission in the amount of $1,146,939.52 occurred after the Commission had lost its quorum but during the Candidate's period of eligibility—this submission was eventually certified on July 17, 2008. Hence, the Candidate did not receive any of the requested matching funds prior to DOI for two reasons. First, the United States Treasury account from which public funds are paid to candidates participating in the presidential primary elections did not have sufficient funds to make any payments until February 14, 2008. Second, the Commission did not have a quorum after December 31, 2007 to certify any additional payments.[11] Therefore, once the Treasury account had sufficient funds, it could only pay the amounts that the Commission had certified prior to December 31, 2007. Eventually, by July 17, 2008, all of the Committee's submissions were certified and paid. The Committee argues that the amount of the first three submissions ($9,972,364.34) is not subject to a repayment determination because the Committee should have received the funds during the period of eligibility and that the rule at 11 C.F.R. § 9034.1(b) should not apply in such a situation.

The Committee's position is that contributions received prior to DOI should be matched regardless of whether there are NOCOs to pay. The Committee contends that, "under normal

[10] Although a time limitation cannot be imposed on the Committee's wind down, the auditors would still have the ability to challenge specific winding down expenses and conduct additional fieldwork even when the Committee is below the 10 percent monetary limitation. 11 C.F.R. § 9038.1(b)(3).

[11] The U.S. Senate resolved this situation by confirming four new commissioners on June 24, 2008. Had neither the lack of a quorum nor the shortfall occurred, the Committee would have received matching funds earlier. However, it was the shortage of public funds that was the main cause of the delay in payment since the vast majority of the funds ($8,825,424.82 out of $12,882,877.42) had been certified for payment prior to the loss of the quorum.